

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

AMERICAN AIRLINES, INC.

Plaintiff,

v.

KIWI.COM, INC. and KIWI.COM, S.R.O.,

Defendants.

§
§
§
§
§
§
§
§
§

CIVIL ACTION No. 4:23-CV-00775-P

**DEFENDANT KIWI.COM, INC.'S
ANSWER AND AFFIRMATIVE DEFENSES**

Defendant Kiwi.com, Inc. (“Kiwi Inc.”) hereby files this Answer and Affirmative Defenses to the Complaint filed by Plaintiff American Airlines, Inc. (“American”) on July 25, 2023 (ECF No. 1) (the “Complaint”).

ANSWER

Kiwi Inc. denies the allegations in the Complaint unless expressly admitted in the following paragraphs. Kiwi Inc.’s specific responses to the numbered allegations of the Complaint are stated in the below numbered paragraphs, and the headings below correspond to the headings used by American in the Complaint.

INTRODUCTION

1. Kiwi Inc. admits that, by its Complaint, American purports to seek monetary and injunctive relief. Kiwi Inc. denies that it is “a rogue online travel agent . . . that holds itself out as an American agent with the authority to sell tickets on American flights . . . through a broad array of deceptive ticketing practices that causes untold harm on American and its ability to serve its customers.” Kiwi Inc. admits that Defendant Kiwi.com, s.r.o. (“Kiwi s.r.o.”) entered into an Agency Program Agreement with American in 2018 and that the agreement expired in 2020, but

Kiwi Inc. denies that Kiwi Inc. was a party to the agreement. Kiwi Inc. denies the remaining allegations in paragraph 1.

2. Kiwi Inc. denies the allegations in paragraph 2.

3. Kiwi Inc. denies the allegations in paragraph 3.

4. Kiwi Inc. denies the allegations in paragraph 4.

5. Kiwi Inc. denies the allegations in paragraph 5.

6. Kiwi Inc. denies the allegations in paragraph 6.

7. Kiwi Inc. admits that the Court granted a motion for a preliminary injunction filed by Southwest Airlines against Kiwi Inc. and Kiwi s.r.o., and Kiwi Inc. admits that, pursuant to the agreement to settle the lawsuit with Southwest Airlines, Kiwi Inc. and Kiwi s.r.o. agreed that they were not opposed to the entry of a permanent injunction. Kiwi Inc. denies that its business “practices” are “abusive.” Kiwi Inc. admits that, by this action, American purports to seek injunctive relief and monetary damages. Kiwi Inc. denies the remaining allegations in paragraph 7.

NATURE OF THE CASE

8. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 and therefore denies them.

9. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 and therefore denies them.

10. Kiwi Inc. admits that Kiwi s.r.o. (f/k/a SkyPicker.com, s.r.o.) entered into an agreement with IATA in 2016 but denies that Kiwi Inc. was a party to the agreement. Kiwi Inc. denies the remaining allegations in paragraph 10.

11. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 and therefore denies them.

12. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12 and therefore denies them.

13. Kiwi Inc. denies that its “sales activities” are or were “unauthorized and abusive.” Kiwi Inc. admits that American sent a letter to Kiwi s.r.o. in 2017 requesting that all American content be removed from Kiwi s.r.o.’s website. Kiwi Inc. admits that Kiwi s.r.o. entered into an Agency Program Agreement with American in 2018. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 13 and therefore denies them.

14. Kiwi Inc. admits that Kiwi s.r.o. was “an accredited and approved agent for American” and “had the right to sell American tickets and related flight services.” Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 14 and therefore denies them.

15. Kiwi Inc. admits that American had discussions with Kiwi s.r.o. in 2019. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 15 and therefore denies them.

16. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16 and therefore denies them.

17. Kiwi Inc. denies the allegations in paragraph 17.

18. Kiwi Inc. denies the allegations in paragraph 18.

19. Kiwi Inc. denies that it entered into any valid and/or enforceable “Use Agreement” regarding the use of AA.com. Kiwi Inc. admits that the current publicly available version of AA.com’s “site usage” webpage states that “[t]he Site is for your personal, non-commercial use”

and that it purports to prohibit using the Site to make any “abusive reservation.” Kiwi Inc. denies the remaining allegations in paragraph 19.

20. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20 and therefore denies them.

21. Kiwi Inc. denies that it “misleads American’s passengers.” Kiwi Inc. admits that, within its product offerings, it offers a bundle package that includes charges for checked bags and insurance for lost luggage, which is provided and priced separately by Kiwi Inc. independently from the luggage fees charged by American. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 21 and therefore denies them.

22. Kiwi Inc. denies the allegations in paragraph 22.

23. Kiwi Inc. denies the allegations in paragraph 23.

24. Kiwi Inc. admits that the Kiwi.com website provides a description of Kiwi.com’s “travel hacks,” including:

Travel hacks

We hack the system, you fly for less: that’s Kiwi.com’s motto. Here’s where we round up our travel hacks. Everything from cheap flight tickets, flight booking hacks, the best ways to save money, and even a few secret hacks and tricks the airlines don’t want you to know!

We’re proud of our travel hacks here at Kiwi.com. Our powerful travel search with flexible filters can show you destinations you’d never even thought of, while hacks like Hidden Cities, throwaway ticketing, Price Alerts, flexible fares, self-transfer, and our unique Nomad multi-city search give you more options to book your perfect trip. Avoid hidden fees, save money, and book cheap flights using Kiwi.com.

Kiwi Inc. denies the remaining allegations in paragraph 24.

25. Kiwi Inc. admits that the Kiwi.com website provides a description of Kiwi.com’s “Kiwi-code,” including:

Technology that makes travel cheaper and simpler for everyone

It all starts with Kiwi-Code — our one-of-a-kind computer code — that we developed to hack the travel system so that you and everyone else can travel more often, for less.

Kiwi-Code sees 95% of all the flights from around the world and performs billions of flight price checks every day to give you the most up-to-date search results, always. What does that mean for you? It's simple: you get more travel search results than you would anywhere else. You see the deals and travel options that airlines don't want you to see and other search engines can't even find. This is how, when you book with Kiwi.com, you're getting some of the best travel deals on the internet.

Kiwi Inc. denies the remaining allegations in paragraph 25.

26. Kiwi Inc. denies the allegations in paragraph 26.

27. Kiwi Inc. admits that American purports to seek a permanent injunction, statutory damages, and disgorgement of Kiwi's profits. Kiwi Inc. denies the remaining allegations in paragraph 27.

28. Kiwi Inc. admits the allegations in paragraph 28.

29. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 29 and therefore denies them.

30. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 30 and therefore denies them.

31. Kiwi Inc. admits the allegations in paragraph 31.

32. To the extent that a response is required, Kiwi Inc. admits that Kiwi s.r.o. is a limited liability company organized under the laws of the Czech Republic, with a place of business located at Rohanské nábřeží 678/25, Karlín, 186 00, Praha 8, Czechia.

33. Kiwi Inc. denies the allegations in paragraph 33.

JURISDICTION AND VENUE

34. Kiwi Inc. admits that this Court has subject matter jurisdiction over claims brought under the Lanham Act and the Copyright Act and that the Court has supplemental or pendent jurisdiction over related state law claims. Kiwi Inc. denies American's allegations of trademark and copyright infringement and denies that American is entitled to any relief.

35. Kiwi Inc. denies the allegations in paragraph 35.

36. Kiwi Inc. denies the allegations in paragraph 36.

37. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 37 and therefore denies them.

38. Kiwi Inc. denies the allegations in paragraph 38.

39. Kiwi Inc. admits that it processes Visa and Mastercard transactions made in USD currency. Kiwi Inc. denies the remaining allegations in paragraph 39.

40. Kiwi Inc. denies the allegations in paragraph 40.

41. Kiwi Inc. denies the allegations in paragraph 41 as Kiwi Inc. did not challenge the Court's lack of personal jurisdiction over Kiwi Inc. in the Southwest case but, rather, challenged venue.

FACTUAL ALLEGATIONS

A. As to "American's Operations and Content"

42. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 42 and therefore denies them.

43. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 43 and therefore denies them.

44. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 44 and therefore denies them.

45. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 45 and therefore denies them.

46. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 46 and therefore denies them.

47. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 47 and therefore denies them.

48. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 48 and therefore denies them.

49. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 49 and therefore denies them.

B. As to “Contractual Terms and Conditions Relating to AA.com”

50. Kiwi Inc. denies that it entered into any valid and/or enforceable “Use Agreement” regarding the use of AA.com. Kiwi Inc. admits that the current publicly available version of AA.com’s “site usage” webpage states that “[a]ll information, products, services and software contained on or used in the Site (“Content”) is Copyright 2019 by American Airlines, Inc.” Kiwi Inc. admits that the current publicly available version of the homepage and other webpages of AA.com reference “Legal, privacy, copyright” information and link to the “site usage” webpage. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 50 and therefore denies them.

51. Kiwi Inc. denies that it entered into any valid and/or enforceable “Use Agreement” regarding the use of AA.com. Kiwi Inc. admits that the current publicly available version of AA.com’s “site usage” webpage states:

In return for gaining access to the Site and using it, you agree to be bound by the following Agreement without limitation or qualification, so please carefully review

this Agreement before proceeding. If you do not intend to be legally bound by these terms and conditions, do not access and use the Site.

Kiwi Inc. admits that the current publicly available version of AA.com's "site usage" webpage states: "You agree that this Agreement is made and entered into in Tarrant County, Texas. You agree that Texas law governs this Agreement's interpretation and/or any dispute arising from your access to, dealings with, or use of the Site" Kiwi Inc. denies the remaining allegations in paragraph 51.

52. Kiwi Inc. denies that it entered into any valid and/or enforceable "Use Agreement" regarding the use of AA.com. Kiwi Inc. admits that the current publicly available version of AA.com's "site usage" webpage states:

[A]ll information, AAdvantage® account information, articles, data, images, passwords, Personal Identification Numbers ("PINs"), screens, text, user names, Web pages, or other materials (collectively "Content") appearing on the Site are the exclusive property of American Airlines Group, Inc., or American Airlines, Inc., or their subsidiaries and affiliates

You may not copy, display, distribute, download, license, modify, publish, re-post, reproduce, reuse, sell, transmit, use to create a derivative work, or otherwise use the content of the Site for public or commercial purposes. . . .

American Airlines provides the Site solely to permit you to determine the availability of goods and services offered on the Site and to make legitimate reservations or otherwise transact business with American Airlines, and for no other purposes. The Site is for your personal, non-commercial use. . . .

You agree that you will not misuse the Site. "Misuse" includes, but is not limited to, using the Site to do any of the following: . . .

- Copy or create derivative works from, display, distribute, license, perform, publish, recreate, re-produce, sell, transfer, or transmit any information, products, services, or software obtained by, from, or through the Site.
- Monitor or copy any Content by using any manual process, or any robot, spider, or other automatic device, without first obtaining American Airlines' prior written consent.

- Act as an agent or attorney in fact for any person who is not a member of your immediate house-hold; or your direct supervisor at your place of employment.
...

Kiwi Inc. denies the remaining allegations in paragraph 52.

53. Kiwi Inc. denies that it entered into any valid and/or enforceable “Use Agreement” regarding the use of AA.com. Kiwi Inc. admits that the current publicly available version of AA.com’s “site usage” webpage provides links to AA.com’s “conditions of carriage” webpage. Kiwi Inc. admits that the current publicly available version of AA.com’s “conditions of carriage” webpage states: “Your ticket is valid only when: Travel is to/from the cities on your ticket and in your trip record.” Kiwi Inc. admits that the current publicly available version of AA.com’s “conditions of carriage” webpage states: “Reservations made to exploit or circumvent fare and ticket rules are prohibited. Examples include (but are not limited to): Purchasing a ticket without intending to fly all flights to gain lower fares (hidden city ticketing).” Kiwi Inc. denies the remaining allegations in paragraph 53.

C. As to “Additional Contractual Agreements Binding Kiwi”

54. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 54 and therefore denies them.

55. Kiwi Inc. admits that Kiwi s.r.o. (f/k/a SkyPicker.com, s.r.o.) entered into an agreement with IATA in 2016 but denies that Kiwi Inc. was a party to the agreement. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 55 and therefore denies them.

56. Kiwi Inc. denies the allegations in paragraph 56 regarding “Kiwi’s” activities. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 56 and therefore denies them.

57. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 57 and therefore denies them.

58. Kiwi Inc. denies the allegations in paragraph 58.

59. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 59 and therefore denies them.

60. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 60 and therefore denies them.

61. Kiwi Inc. denies the allegations in paragraph 61.

62. Kiwi Inc. denies the allegations in paragraph 62.

D. As to “Distribution and Related Contractual Agreements Between American and Its Agents”

63. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 63 and therefore denies them.

1. As to “Suspension, Limitation or Termination of Agency Authority”

64. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 64 and therefore denies them.

65. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 65 and therefore denies them.

66. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 66 and therefore denies them.

2. As to “Hidden City Ticketing”

67. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 67 and therefore denies them.

68. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 68 and therefore denies them.

69. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 69 and therefore denies them.

3. As to “Failure to Provide Complete Passenger Data”

70. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 70 and therefore denies them.

71. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 71 and therefore denies them.

72. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 72 and therefore denies them.

4. As to “Misuse of Carrier Data”

73. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 73 and therefore denies them.

74. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 74 and therefore denies them.

75. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 75 and therefore denies them.

5. As to “Misuse of Intellectual Property”

76. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 76 and therefore denies them.

77. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 77 and therefore denies them.

78. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 78 and therefore denies them.

6. As to “Acting for or Assisting Unauthorized Agents”

79. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 79 and therefore denies them.

80. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 80 and therefore denies them.

81. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 81 and therefore denies them.

E. As to “American’s Valuable Trademarks and Copyrights”

82. Kiwi Inc. admits that American has used and continues to use the trade name “American Airlines” and other trademarks, service marks, and copyrights, including on AA.com. Kiwi Inc. admits that American has used its “Flight Symbol” design as a trademark. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 82 and therefore denies them.

83. Kiwi Inc. admits that American has used the “American Airlines” name and its “Flight Symbol” design as trademarks. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 83 and therefore denies them.

84. Kiwi Inc. admits that the publicly available USPTO records identify American as the owner of certain registered trademarks. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 84 and therefore denies them.

85. Kiwi Inc. admits that the publicly available USPTO records identify American as the owner of the registered trademarks identified in paragraph 85. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 85 and therefore denies them.

86. Kiwi Inc. admits that the publicly available records of the U.S. Copyright Office identify American as the claimant of U.S. Copyright Registration No. VA00002130520. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 86 and therefore denies them.

87. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 87 and therefore denies them.

88. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 88 and therefore denies them.

89. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 89 and therefore denies them.

90. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 90 and therefore denies them.

91. Kiwi Inc. denies that it has infringed the American Marks and American Copyright. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 91 and therefore denies them.

92. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 92 and therefore denies them.

F. As to “Kiwi’s Abusive Practices and Breaches of Contract and Agency Duties”

93. Kiwi Inc. denies the allegations in paragraph 93.

94. Kiwi Inc. denies the allegations in paragraph 94.

95. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 95 and therefore denies them.

96. Kiwi Inc. denies the allegations in paragraph 96.

1. As to “Accessing and Using American’s Content”

97. Kiwi Inc. denies the allegations in paragraph 97.

2. As to “Booking Through AA.com”

98. Kiwi Inc. denies the allegations in paragraph 98.

99. Kiwi Inc. denies the allegations in paragraph 99.

100. Kiwi Inc. denies that it “misleads its and American’s customers.” Kiwi Inc. admits that, within its product offerings, it offers a bundle package that includes charges for checked bags and insurance for lost luggage, which is provided and priced separately by Kiwi Inc. independently from the luggage fees charged by American. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 100 and therefore denies them.

3. As to “Unauthorized Booking Through Other Agencies and Shadow PCCs”

101. Kiwi Inc. denies the allegations in paragraph 101.

102. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 102 and therefore denies them.

103. Kiwi Inc. denies that it has “embedded one or more of its key employees into one or more consolidators” and denies that Kiwi Inc. is “booking flights through those consolidators, to try to cover its tracks, and to book and sell flights without authorization.” Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 103 and therefore denies them.

104. Kiwi Inc. denies the allegations in paragraph 104.

105. Kiwi Inc. denies the allegations in paragraph 105.

G. As to “Kiwi’s Violation of American’s Intellectual Property”

106. Kiwi Inc. admits that American’s marks, including the “American Airlines” name and the Flight Symbol design, are used on the Kiwi.com website. Kiwi Inc. denies the remaining allegations in paragraph 106.

107. Kiwi Inc. denies the allegations in paragraph 107.

108. Kiwi Inc. admits that “hidden city” tickets are offered for sale and described as a “travel hack” on the Kiwi.com website. Kiwi Inc. denies the remaining allegations in paragraph 108.

109. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 109 and therefore denies them.

110. Kiwi Inc. denies that its “conduct” is “abusive” and denies that it has infringed American’s trademarks and American’s copyright. Kiwi Inc. admits that American has communicated with Kiwi s.r.o. and has requested that American’s content be removed from Kiwi s.r.o.’s website. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 110 and therefore denies them.

111. Kiwi Inc. denies the allegations in paragraph 111.

112. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 112 and therefore denies them.

113. Kiwi Inc. denies that its “business model” is “abusive.” Kiwi Inc. admits that other airlines have tried to prevent the display of their flight content on the Kiwi.com website. Kiwi Inc. admits that the Court granted a motion for a preliminary injunction filed by Southwest Airlines against Kiwi Inc. and Kiwi s.r.o., and Kiwi Inc. admits that, pursuant to the agreement to settle the lawsuit with Southwest Airlines, Kiwi Inc. and Kiwi s.r.o. agreed that they were not opposed to

the entry of a permanent injunction. Kiwi Inc. admits that, by this action, American purports to seek injunctive relief and monetary damages. Kiwi Inc. denies the remaining allegations in paragraph 113.

COUNT I
(Alleged Breach of AA.com Use Agreement and Conditions of Carriage)

114. Kiwi Inc. incorporates its responses to the factual allegations in the preceding paragraphs herein by reference.

115. Kiwi Inc. denies that it is a party to or is otherwise “governed by” any valid and/or enforceable “Use Agreement” regarding the use of AA.com.

116. Kiwi Inc. admits that the current publicly available version of the homepage and other webpages of AA.com reference “Legal, privacy, copyright” information and link to the “site usage” webpage. Kiwi Inc. admits that the current publicly available version of AA.com’s “site usage” webpage provides links to AA.com’s “conditions of carriage” webpage. Kiwi Inc. admits that the Kiwi.com website has Terms of Use and Terms & Conditions, which are accessible by links on the Kiwi.com website. Kiwi Inc. admits that the Kiwi.com Terms & Conditions state that “[t]he Agreement is concluded between [customers] and Kiwi.com upon completion of a Booking or ordering of any Kiwi.com Service.” Kiwi Inc. denies the remaining allegations in paragraph 116.

117. Kiwi Inc. denies that it entered into any valid and/or enforceable “Use Agreement” regarding the use of AA.com. Kiwi Inc. admits that the current publicly available version of AA.com’s “site usage” webpage states:

In return for gaining access to the Site and using it, you agree to be bound by the following Agreement without limitation or qualification, so please carefully review this Agreement before proceeding. If you do not intend to be legally bound by these terms and conditions, do not access and use the Site.

Kiwi Inc. denies the remaining allegations in paragraph 117.

118. Kiwi Inc. denies the allegations in paragraph 118.

119. Kiwi Inc. denies that it entered into any valid and/or enforceable “Use Agreement” regarding the use of AA.com. Kiwi Inc. admits that the current publicly available version of AA.com’s “site usage” webpage states:

You may not copy, display, distribute, download, license, modify, publish, re-post, reproduce, reuse, sell, transmit, use to create a derivative work, or otherwise use the content of the Site for public or commercial purposes. . . .

You agree that you will not misuse the Site. “Misuse” includes, but is not limited to, using the Site to do any of the following: . . . Engage in any commercial purpose

Kiwi Inc. denies the remaining allegations in paragraph 119.

120. Kiwi Inc. denies that it entered into any valid and/or enforceable “Use Agreement” regarding the use of AA.com. Kiwi Inc. admits that the current publicly available version of AA.com’s “site usage” webpage states: “You agree that without limitation you shall not make any fictitious, fraudulent, or abusive reservation” Kiwi Inc. admits that the current publicly available version of AA.com’s “site usage” webpage provides links to AA.com’s “conditions of carriage” webpage. Kiwi Inc. admits that the current publicly available version of AA.com’s “conditions of carriage” webpage states: “Your ticket is valid only when: Travel is to/from the cities on your ticket and in your trip record.” Kiwi Inc. admits that the current publicly available version of AA.com’s “conditions of carriage” webpage states: “Reservations made to exploit or circumvent fare and ticket rules are prohibited. Examples include (but are not limited to): Purchasing a ticket without intending to fly all flights to gain lower fares (hidden city ticketing).” Kiwi Inc. denies the remaining allegations in paragraph 120.

121. Kiwi Inc. denies that it entered into any valid and/or enforceable “Use Agreement” regarding the use of AA.com. Kiwi Inc. admits that the current publicly available version of AA.com’s “site usage” webpage states:

You agree that you will not misuse the Site. “Misuse” includes, but is not limited to, using the Site to do any of the following: . . . Act as an agent or attorney in fact for any person who is not a member of your immediate house-hold; or your direct supervisor at your place of employment. . . .

Kiwi Inc. denies the remaining allegations in paragraph 121.

122. Kiwi Inc. denies the allegations in paragraph 122.

123. Kiwi Inc. denies the allegations in paragraph 123.

124. Kiwi Inc. denies the allegations in paragraph 124.

COUNT II
(Alleged Breach of GTAA)

125. Kiwi Inc. incorporates its responses to the factual allegations in the preceding paragraphs herein by reference.

126. Kiwi Inc. admits that Kiwi s.r.o. (f/k/a SkyPicker.com, s.r.o.) entered into an agreement with IATA in 2016 but denies that Kiwi Inc. was a party to the agreement. Kiwi Inc. admits that Kiwi s.r.o.’s IATA accreditation remains in effect today.

127. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 127 and therefore denies them.

128. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 128 and therefore denies them.

129. Kiwi Inc. admits that Kiwi s.r.o. entered into an Agency Program Agreement with American in 2018 and that the agreement expired in 2020, but Kiwi Inc. denies that Kiwi Inc. was a party to the agreement. Kiwi Inc. denies the remaining allegations in paragraph 129.

130. Kiwi Inc. denies the allegations in paragraph 130.

131. Kiwi Inc. denies the allegations in paragraph 131.

132. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 132 and therefore denies them.

133. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 133 and therefore denies them.

134. Kiwi Inc. denies the allegations in paragraph 134.

135. Kiwi Inc. denies the allegations in paragraph 135.

136. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 136 and therefore denies them.

137. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 137 and therefore denies them.

138. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 138 and therefore denies them.

139. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 139 and therefore denies them.

140. Kiwi Inc. denies the allegations in paragraph 140.

141. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 141 and therefore denies them.

142. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 142 and therefore denies them.

143. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 143 and therefore denies them.

144. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 144 and therefore denies them.

145. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 145 and therefore denies them.

146. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 146 and therefore denies them.

147. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 147 and therefore denies them.

148. Kiwi Inc. denies the allegations in paragraph 148.

149. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 149 and therefore denies them.

150. Kiwi Inc. denies the allegations in paragraph 150.

COUNT III

(Alleged Tortious Interference with American's Contracts with Authorized Agents)

151. Kiwi Inc. incorporates its responses to the factual allegations in the preceding paragraphs herein by reference.

152. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 152 and therefore denies them.

153. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 153 and therefore denies them.

154. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 154 and therefore denies them.

155. Kiwi Inc. admits that Kiwi s.r.o. entered into an Agency Program Agreement with American in 2018 and that the agreement expired in 2020, but Kiwi Inc. denies that Kiwi Inc. was a party to the agreement. Kiwi Inc. denies the remaining allegations in paragraph 155.

156. Kiwi Inc. denies the allegations in paragraph 156.

157. Kiwi Inc. denies the allegations in paragraph 157.

158. Kiwi Inc. denies the allegations in paragraph 158.

159. Kiwi Inc. denies the allegations in paragraph 159.

160. Kiwi Inc. denies the allegations in paragraph 160.

161. Kiwi Inc. denies the allegations in paragraph 161.

162. Kiwi Inc. denies the allegations in paragraph 162.

COUNT IV
(Alleged Trademark Infringement under 15 U.S.C. § 1114)

163. Kiwi Inc. incorporates its responses to the factual allegations in the preceding paragraphs herein by reference.

164. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 164 and therefore denies them.

165. Kiwi Inc. admits that some of the services offered by American are similar to the services available from the Kiwi.com website. Kiwi Inc. denies the remaining allegations in paragraph 165.

166. Kiwi Inc. denies the allegations in paragraph 166.

167. Kiwi Inc. denies the allegations in paragraph 167.

168. Kiwi Inc. denies the allegations in paragraph 168.

169. Kiwi Inc. denies the allegations in paragraph 169.

170. Kiwi Inc. denies the allegations in paragraph 170.

171. Kiwi Inc. denies the allegations in paragraph 171.

COUNT V
(Alleged Copyright Infringement under 17 U.S.C. § 101)

As to the following paragraphs, Kiwi Inc. begins again with paragraph 1 to correspond to the numbering in American's Complaint and states as follows:

1. Kiwi Inc. incorporates its responses to the factual allegations in the preceding paragraphs herein by reference.

2. Kiwi Inc. admits that the publicly available records of the U.S. Copyright Office identify American as the claimant of U.S. Copyright Registration No. VA00002130520. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 2 and therefore denies them.

3. Kiwi Inc. admits that images of American's Flight Symbol logo are publicly accessible as they are published on AA.com and other placed on the Internet. Kiwi Inc. admits that images of American's Flight Symbol logo are displayed on the Kiwi.com website. Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 3 and therefore denies them.

4. Kiwi Inc. denies the allegations in paragraph 4.

5. Kiwi Inc. denies the allegations in paragraph 5.

6. Kiwi Inc. denies the allegations in paragraph 6.

COUNT VI
(Alleged Texas State Law Claims for Common-Law Unfair Competition)

7. Kiwi Inc. incorporates its responses to the factual allegations in the preceding paragraphs herein by reference.

8. Kiwi Inc. denies that it "has been using American's Marks with the intent to mislead the public and lead to confusion and mistake, including attempting to pass off goods and services as being American's." Kiwi Inc. denies that its "actions constitute common-law trademark infringement and unfair competition under Texas law." Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 8 and therefore denies them.

9. Kiwi Inc. denies the allegations in paragraph 9.

COUNT VII

(Alleged False Designation of Origin and Unfair Competition under 15 U.S.C. § 1125(a))

10. Kiwi Inc. incorporates its responses to the factual allegations in the preceding paragraphs herein by reference.

11. Kiwi Inc. admits that the publicly available USPTO records identify American as the owner of certain registered trademarks.

12. Kiwi Inc. denies the allegations in paragraph 12.

13. Kiwi Inc. denies the allegations in paragraph 13.

14. Kiwi Inc. denies the allegations in paragraph 14.

15. Kiwi Inc. denies the allegations in paragraph 15.

16. Kiwi Inc. denies the allegations in paragraph 16.

17. Kiwi Inc. denies the allegations in paragraph 17.

AMERICAN'S REQUEST FOR ATTORNEY FEES

18. Kiwi Inc. incorporates its responses to the factual allegations in the preceding paragraphs herein by reference.

19. To the extent that a response is required, Kiwi Inc. denies that American is entitled to recover its requested attorneys' fees.

ALLEGED CONDITIONS PRECEDENT

20. To the extent that a response is required, Kiwi Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20 and therefore denies them.

AMERICAN'S APPLICATION FOR INJUNCTIVE RELIEF

21. To the extent that a response is required, Kiwi Inc. denies the allegations in paragraph 21.

22. To the extent that a response is required, Kiwi Inc. denies that American is entitled to the requested injunctive relief.

23. To the extent that a response is required, Kiwi Inc. denies that American is entitled to the requested injunctive relief.

AMERICAN'S PRAYER FOR RELIEF

To the extent a response is required, Kiwi Inc. denies that American is entitled to the requested relief in the Complaint or any relief whatsoever.

AFFIRMATIVE DEFENSES

Kiwi Inc. alleges and asserts the following defenses in response to the allegations of the Complaint, undertaking the burden of proof only as to those defenses deemed affirmative defenses by law, regardless of how such defenses are denominated herein. Kiwi Inc. reserves the right to amend this Answer, including asserting additional defenses once discovery progresses or as allowed by the Court.

FIRST AFFIRMATIVE DEFENSE (Lack of Personal Jurisdiction)

American's claims are barred, in whole or in part, to the extent that the Court lacks personal jurisdiction over Kiwi Inc.

SECOND AFFIRMATIVE DEFENSE (Failure to State a Claim)

American's claims are barred, in whole or in part, to the extent that the Complaint fails to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE (Statute of Limitations)

American's claims are barred, in whole or in part, by the applicable statute of limitations.

FOURTH AFFIRMATIVE DEFENSE
(Equitable Estoppel, Consent, Waiver, and/or Acquiescence)

American's claims are barred, in whole or in part, by the doctrines of equitable estoppel, consent, waiver, and/or acquiescence.

FIFTH AFFIRMATIVE DEFENSE
(Laches)

American's claims are barred, in whole or in part, by the doctrine of laches.

SIXTH AFFIRMATIVE DEFENSE
(Unclean Hands)

On information and belief, American's claims are barred, or its claims for recovery are limited, in whole or in part, by the doctrine of unclean hands.

SEVENTH AFFIRMATIVE DEFENSE
(Lack of Standing)

American's breach of contract claims are barred, in whole or in part, by lack of standing.

EIGHTH AFFIRMATIVE DEFENSE
(Failure of Consideration)

American's breach of contract claims are barred, in whole or in part, for failure of consideration.

NINTH AFFIRMATIVE DEFENSE
(Lack of Privity)

American's breach of contract claims are barred, in whole or in part, for lack of privity.

TENTH AFFIRMATIVE DEFENSE
(No Mutual Assent)

American's breach of contract claims are barred, in whole or in part, by no mutual assent.

ELEVENTH AFFIRMATIVE DEFENSE
(Contract Void as Against Public Policy)

American's breach of contract claims are barred, in whole or in part, to the extent that the alleged contracts are void as against public policy.

**TWELFTH AFFIRMATIVE DEFENSE
(Illegality of Contract)**

American's breach of contract claims are barred, in whole or in part, because performance of the contract is illegal and in violation of the Sherman Act.

**THIRTEENTH AFFIRMATIVE DEFENSE
(Failure of Conditions Precedent)**

American's breach of contract claims are barred, in whole or in part, because it failed to perform conditions precedent.

**FOURTEENTH AFFIRMATIVE DEFENSE
(Trademark Fair Use)**

American's trademark infringement, false designation of origin, and unfair competition claims are barred, or its claims for recovery are limited, in whole or in part, by the doctrine of fair use, including but not limited to nominative fair use.

**FIFTEENTH AFFIRMATIVE DEFENSE
(Trademark Exhaustion and First Sale Doctrine)**

American's trademark infringement, false designation of origin, and unfair competition claims are barred, or its claims for recovery are limited, in whole or in part, by trademark exhaustion and/or the first sale doctrine.

**SIXTEENTH AFFIRMATIVE DEFENSE
(Trademark Misuse)**

American's trademark infringement, false designation of origin, and unfair competition claims are barred, or its claims for recovery are limited, in whole or in part, because American used its trademark rights to unfairly extend its monopoly and suppress lawful competition.

**SEVENTEENTH AFFIRMATIVE DEFENSE
(Copyright Fair Use)**

American's copyright infringement claim is barred or limited by 17 U.S.C. § 107.

**EIGHTEENTH AFFIRMATIVE DEFENSE
(Copyright Exhaustion and First Sale Doctrine)**

American's copyright infringement claim is barred, or its claim for recovery is limited, in whole or in part, by copyright exhaustion and/or the first sale doctrine.

**NINETEENTH AFFIRMATIVE DEFENSE
(Copyright Misuse)**

American's copyright infringement claim is barred, or its claim for recovery is limited, in whole or in part, because American used its copyright to unfairly extend its monopoly and suppress lawful competition.

**TWENTIETH AFFIRMATIVE DEFENSE
(Copyright Statute of Limitations)**

American's copyright infringement claim is barred or limited by 17 U.S.C. § 507(b).

**TWENTY-FIRST AFFIRMATIVE DEFENSE
(Contributory Negligence/Comparative Fault)**

American's claims are barred, in whole or in part, by American's own contributory negligence or comparative fault.

**TWENTY-SECOND AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)**

American's recovery of damages is barred or reduced because American failed to mitigate its damages.

RESERVATION OF RIGHTS

Kiwi Inc. reserves the right to add any additional defenses that may now exist or in the future may be available based on discovery and further factual investigation in this case.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(b), Kiwi Inc. hereby demands a trial by jury of all issues so triable in this action.

PRAYER FOR RELIEF

WHEREFORE, Defendant Kiwi Inc. prays for the following relief:

- A. A judgment in favor of Kiwi Inc. denying American of all relief requested in the Complaint with prejudice;
- B. An award to Kiwi Inc. of its attorneys' fees and costs for prevailing against American's Complaint; and
- C. Such other and further relief as this Court deems just and proper.

Dated: November 13, 2023

Respectfully submitted,

/s/ T. Ray Guy

T. Ray Guy

Texas Bar No. 08648500

rguy@fbtlaw.com

Amy E. LaValle

Texas Bar No. 24040529

alavalle@fbtlaw.com

Ben A. West

Texas Bar No. 24084074

bwest@fbtlaw.com

Ha-Vi L. Nguyen

Texas Bar No. 24105693

hlnghuyen@fbtlaw.com

FROST BROWN TODD, LLP

Rosewood Court

2101 Cedar Springs Road, Suite 900

Dallas, Texas 75201

Telephone: (214) 545-3472

-and-

Ann Marie Arcadi

Texas Bar No. 00786994

annmarie.arcadi@arcadijackson.com

Heather Summerfield

Texas Bar No. 24095772

heather.summerfield@arcadijackson.com

Seema Tendolkar

Texas Bar No. 24053509

seema.tendolkar@arcadijackson.com

Neakzaad L. Horriat

Texas Bar No. 24116536

neak.horriat@arcadijackson.com

ARCADI JACKSON, LLP

2911 Turtle Creek Blvd., Suite 800

Dallas, Texas 75219

Telephone: (214) 865-6458

**ATTORNEYS FOR DEFENDANT
KIWI.COM, INC.**

CERTIFICATE OF SERVICE

Pursuant to the Federal Rules of Civil Procedure, I hereby certify that a true and correct copy of the foregoing document, DEFENDANT KIWI.COM, INC.'S ANSWER AND AFFIRMATIVE DEFENSES, was served to all counsel of record via CM/ECF.

Dated: November 13, 2023

/s/ T. Ray Guy

0155054.0776820 4866-1824-2445v6